IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LINDA THORPE,	)	
	)	
vs.	)	
	)	
GTE CORPORATION, GTE FLORIDA INCORPORATED, AT&T COW.,	)	Case No.8:00-CV-1231-T-17C
SPRINT-FLORIDA, INCORPORATED, and MCI WORLDCOM NETWORK SERVICES, INC.	)	
	)	

GTE FLORIDA INCORPORATED AND AT&T CORP.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR DISPOSITIVE MOTION TO DISMISS PURSUANT TO FEDERAL CIVIL PROCEDURE RULE 12(b)(6)

I. INTRODUCTION

Plaintiff Linda Thorpe has sued several regulated telecommunications companies that provide local and long distance telephone service in the state of Florida and throughout the United States. Defendant GTE Florida Incorporated is a local exchange carrier ("LEC") that provides regulated local telephone service, intrastate intraLATA toll service,[1] and access to the long distance network in the Tampa area. Defendant AT&T Corp. is an interexchange carrier ("IXC") that provides regulated interstate long distance telecommunications service. MCI Worldcom Network Service, Inc. ("Worldcom") is an IXC and Sprint-Florida. Incorporated ("Sprint") is a LEC that provide service in Florida. They have filed separate pleadings because Plaintiff has failed *to* allege that she has ever been a customer of these entities

Plaintiffs claims directly challenge two essential elements of interstate long distance telephone services, both of which are regulated by the Federal Communications Commission ("FCC") pursuant to federal law and governed by applicable tariffs filed with the FCC. Those two elements are: (a) the provision of, and charges for, long distance access by LECs, such as GTE Florida, and (b) the provision of, and charges for, long distance services by IXCs. such as AT&T.

The gravamen of Plaintiffs' Complaint is her unsupported claim that she should not be required to pay for access to the long distance network on her second phone line. In paragraph 19 of her Complaint, she alleges: "There is no statutory or other requirement that a given local phone line have long distance capability." This single, mistaken allegation forms the basis of her claims that: (a) the charges on her phone bill for interstate access constitute a "negative option" and an unfair trade practice (Compl. at ¶¶ 22, 25, 31, 43, 69); (b) there is no "contract" that sets forth the applicable terms of service and charges for her long distance service (Compl. at ¶¶ 23-26); and (c) she has been improperly billed for charges on the portion of her telephone bill from AT&T that are identified as "Carrier Line" and "Universal Connectivity" charges and for the "monthly minimum" fees charged by the IXCs with which she contracted (see Compl. at ¶¶ 13, 16).

Plaintiffs Complaint purports to assert state-law claims, but the resolution of those claims is governed entirely by federal law. All claims raising "questions concerning the duties, charges and liabilities of . . . telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are

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[1] Intrastate intraLATA calls are calls originating and terminating between two points

precluded from acting in this area." *MCI Communications Corp. v. O'Brien Marketing, Inc.*, 913 F. Supp. 1536, 1540 (S.D. Fla. 1995).

For example, Plaintiffs core allegation that she should not have to pay for interstate long distance access on her second phone line has been conclusively rejected by the FCC and by courts interpreting the FCC's orders. First, Section 251 of the Communications Act, 47 U.S.C. § 251, requires that all LECs interconnect their customers with all other local and long distance telecommunications providers. The Act simply does not permit GTE Florida to offer a "local service only" option that Plaintiff requests — thatis, a phone line that is completely detached from all other aspects of the regulated national telecommunications network. Second, the Eighth Circuit, adjudicating a challenge to certain FCC orders, has conclusively rejected the argument that customers should be able to opt out of the universal obligation to pay for access to the long distance network on their telephone lines. *Southwestern Bell Tel. Co. v. Federal Comm. Comm'n*, 153 F.3d 523, 558 (8th Cir 1998).

Plaintiffs allegation that there is no "contract" for her telephone service and her challenge to the specific charges on her bill also fails as a matter of law. Plaintiff has asserted certain claims that are directly related to tariffs that the Defendants, pursuant to the requirements of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*("FCA"), must file with the FCC. Once filed and effective, these tariffs "conclusively and exclusively control the rights and liabilities between the parties," *MCI Tele. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 132 (D.N.J.1995), and have the force and effect of federal law.' *American Tel.*

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within the same FCC-created boundary, but outside a customer's particular local calling area.

[2] This Court may take judicial notice of Defendants' federal rate filings. See, *e.g.*, Fed. R Evid. 201; *Cash Inn of Dade, Inc. v. Metropolitan Dade Cty.*, 938 F.2d 1239, 1242-43 (11th

& Tel. Co. v. City of New York, *83* F.3d 549, *552* (2d Cir. 1996); *Carter v. American Tel. & Tel. Co.*, 365 F. 2d *486*, *496* (5th Cir. 1966).

The contract, terms of service, and charges for interstate long distance access are clearly described in the tariffs filed by Defendants with the FCC. Plaintiffs claims, whether styled as state law contract or tort claims, are completely barred by these federal tariffs pursuant to the filed-rate doctrine, which precludes Plaintiff from seeking judicial relief from those tariffs. ***See,*** *e.g., Taffet v. Southern Co.*, 967 F.2d 1483, 1488-89 (11th Cir. 1992); *Marcus v. AT&T Corp.*, 138 F.3d *46*, 58-59 (2d Cir. 1998) (filed-rate doctrine precludes state law causes of action whether brought as tort or contract claims, individually or on behalf of a class) (citing cases).

The Complaint suffers from other, similarly dispositive, defects. Plaintiffs breach of contract claims must be dismissed because, as a matter of law, she has suffered no legal injury. Her claim allegedly brought pursuant to the Florida's Unfair and Deceptive Trade Practices Act ("FUDTPA") is barred because the conduct about which she complains is permitted or mandated by federal law, and is subject to the regulation of the FCC and the Florida Public Service Commission ("Florida PSC").

In the alternative, this Court should dismiss or stay Plaintiffs Complaint because it concerns conduct — the provision of and the charges imposed in connection with regulated long distance service — that is within the primary jurisdiction of the FCC. Accordingly, the Court should refer the case to the FCC since it has been delegated the authority to determine

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Cir. *1991)* (courts may take judicial notice of records before and orders of administrative bodies); *see also Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1164-65 (S.D.N.Y. 1996), *aff'd*, 138 F.3d ***36*** (2nd Cir. 1998) (courts may take judicial notice of tariffs filed with the FCC.)

national telecommunications policy and has the necessary experience to adjudicate what amounts to a direct challenge to the manner by which local and long distance telecommunications providers allocate costs and bill telephone users for use of the public switched network on a nationwide basis.

II. BACKGROUND AND FACTS

A. Background Of The Parties

Thorpe has sued several different types of telecommunications providers in her Complaint, but alleges that she has done business with only two of those providers – GTE Florida and AT&T. (Compl. ¶¶ 9-17.) GTE Florida is a regulated LEC that is licensed by the FCC and the Florida PSC to provide consumers with certain telecommunications services, including basic local telephone service, in parts of Florida. (Compl. at ¶ 3.) Pursuant to federal and state law, GTE Florida has filed tariffs with the Florida PSC for its local service offerings and with the FCC for its interstate access services and associated charges. (*See* GTE Florida FCC Tariff No. 1, attached as Exh. 1.)[3]

AT&T, among other things, is a provider of interstate long distance service.[4] (Compl. at ¶ 7.) Because it is a common carrier providing interstate wire communications services, it is regulated by the FCC and has filed tariffs concerning its interstate rates and charges

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[3] GTE Florida's tariffed terms and charges are included in tariffs filed jointly with the FCC by all GTE Telephone Operating Companies in the United States.

[4] Long distance service may include calls made across certain exchange boundaries within a state, known as intrastate toll calls, or between certain exchanges located across state lines, known as interstate calls. Intrastate calls are regulated by the Florida PSC while interstate calls are regulated by the FCC. Regardless of the type of call, however, these calls require access from the "local loop" to the "long distance network" as generically described in Plaintiffs Complaint, and the FCC imposes the national framework for the types of access that are mandatory or permissible for telecommunications carriers. 47 U.S.C. § 151.

(including the charges forming the basis of Plaintiffs claims) with that regulatory agency. 47 U.S.C. §§ 201(a), 203(c).[5] Plaintiffs bills, attached as exhibits to her Complaint, reflect that for some period of time she was an AT&T long distance customer and made long distance telephone calls over AT&T's long distance network. (Compl. at ¶ 12 and Exhs. **A**-B.)

B. Nature **Of** Thorpe's **Claims**

Plaintiffs Complaint is based entirely on her unsupported belief that she should not be required to pay for access to the long distance network on her second phone line: 'There is no statutory or other requirement that a given local phone line have long distance capability." (Compl. at ¶ 19.) She alleges that she contracted with GTE Florida, the LEC in the Tampa area, for basic telephone service on a second telephone line in her home sometime in 1997 or 1998. (Cornpl. at ¶ 9.) **At** that time, she alleges AT&T was her "Presubscribed Interexchange Carrier," or PIC. ***(See*** Compl. at ¶ 10.) In late 1998, Thorpe allegedly determined that she wanted to use this second line exclusively for her computer modem and purportedly only for local calls. (Compl. at ¶ 11.) Thorpe's bills, however, indicate that she continued to make long distance calls from this telephone line. ***(See*** Compl. at Exh. D (showing a call from her second phone line to Alexandria, VA on August 12, 1999).)

Plaintiff alleges that in January 1999 she contacted GTE Florida and was informed by a customer service agent that she must have "long distance service associated with the subject line." (Compl. at ¶ 12.) Plaintiff complains that this representation was somehow untrue and that she should not have to pay for long distance access and the associated charges

[5] **See** AT&T FCC Tariff No. 27, attached as Exh. 2, as an illustrative example of AT&T's

on her second telephone line. *Id.* She alleges that there is no law or statutory authority requiring "that a given local phone line have long distance capability" and that there are no "contracts" that set forth the terms of her telephone service. (Compl. at ¶¶ 19-24.) From this mistaken assumption, Thorpe concludes that the provision of long distance access for her second phone line amounts to a "negative option" imposed on consumers, (Compl. at ¶¶ *22, 25.)* She complains that she should not have to pay charges from AT&T for long distance services identified as "Carrier Line" and "Universal Connectivity" charges. After she switched to long distance service provided by another IXC, GTE Communications Corporation ("GTECC"), not a defendant here, in March 1999, she complains about the $3.00 monthly minimum amount charged by that entity beginning in September 1999.[6] (Compl. at ¶ 16.)

Each of the charges that Plaintiff disputes is contained in tariffs filed with the FCC. Although Plaintiff describes the disputed charges in only the vaguest of terms, Defendants set forth below the regulated and tariffed charges for interstate access that appear on Plaintiffs telephone bills attached as Exhibits A-D to her Complaint? The rationale for and amount of

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federal tariff filings regarding the charges at issue in Plaintiffs Complaint.

[6] GTECC is a federally regulated IXC that is a separate entity from GTE Florida. Because Plaintiff has alleged that she purchased long distance service from this IXC as well, **a** copy of the applicable portions of GTECC's tariffs for long distance service is attached as Exhibit 3.

[7] The FCC has published two "user-friendly" guides to educate consumers regarding these charges. These "Factsheets" and "Consumer News Alerts" are available via the FCC's web site at www.fcc.gov. Specifically, the FCC's Factsheet regarding the Presubscribed Interexchange Carrier Charge, attached at Exh. 4, is located at http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/picc.html, and the FCC's Consumer News Alert regarding the Federal Subscriber Line Charge, attached at Exh. 5, is located at http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/fedsubs.pdf.

these charges is set forth more fully in the FCC's First Report and Order in its comprehensive *Access Charge Reform* proceeding.[8]

Subscriber Line Charge. The Subscriber Line Charge ("SLC") is a flat, non-use-sensitive fee that is charged by LECs to telephone users for both primary and secondary lines into a residence or business. ***First*** *Rep. nnd Order,* at ¶ 37. The purpose of the SLC is to compensate LECs for providing the facilities used to access the "local loop," which is used for local service as well as to originate and terminate long distance calls. *First Rep. and Order,* at ¶¶ 17, 37. The FCC has placed caps on the SLC that LECs may recover from their customers. For a primary residential line the maximum SLC is $3.50 per month, and for all "non-primary" residential lines (such as Thorpe's "modem" line) the maximum charge after January 1, 1999 is $6.07 per month.' *First Rep. and Order,* at ¶¶ 37, 58. These charges are set forth in GTE Florida's FCC Tariff No. 1. *(See* Exh. 1.) In addition, Plaintiffs January 1999 telephone bill from GTE Florida explained this increased charge. *(See* Compl. at Exh. **A,** p. 5 of 10.)

Common Carrier Line Charge. The Common Camer Line Charge ("CCLC") is a per-minute, usage-based charge that LECs may pass on to IXCs, such as AT&T, to recover charges for use of the local loop by the IXCs and their customers. *First Rep. and Order,* at ¶ 37. The IXCs, in turn, may recover these charges from their rates to long distance customers. *Id.* Through the *Access Charge Reform* proceeding, the CCLC that LECs may charge to

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[8] *In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and* ***Pricing,*** *and End User Common Line Charges,* (CC Docket Nos. 96-262, 94-1, 91-213, 95-72), FCC 97-158, 12 F.C.C. Rcd No. 15982 ("First Report and Order"), *aff'd sub nom., Southwestern Bell Tel. Co.* v. *Federal Comm. Comm'n,* 153 F.3d 523 (8th Cir. 1998).

IXCs was decreased because the FCC introduced a new, fixed-rate charge that allows LECs to recover local loop costs from IXCs. *Id.* at ¶¶ 88-110. This charge is known as the Presubscribed Interexchange Camer Charge.

Presubscribed Interexchange Carrier Charge. The Presubscribed Interexchange Camer Charge ("PICC") is a flat, per-line charge assessed on the IXC that the customer uses for that particular phone line. ***First Rep. and Order,*** at ¶¶ 38, 59. The FCC instituted this charge, in conjunction with a decrease in the CLCC, to allow LECs to recover residual charges for access to the local loop by IXCs that are not recovered by the SLC. The maximum PICC that LECs could charge increased on July 1, 1999, from $1.50 per month *to* $2.53 per month along with a corresponding reduction in the per-minute CLCC. *Id. at* ¶ 59. The PICC charged by GTE Florida to each IXC is set forth in its FCC Tariff No. 1 at Section 12.4.5. (Exh. 1.)

The FCC held that a LEC may directly charge the PICC to customers who do not "presubscribe" to an IXC. ***First Rep. and Order,*** at ¶ 92. The FCC reasoned that "[a]ssessing the PICC directly against end users that do not presubscribe *to* a long-distance carrier should eliminate the incentive for customers to access long-distance services solely through 'dial around' carriers in order to avoid paying long-distance rates that reflect the PICC." ***Id.***[10] Thus, regardless of whether Plaintiff chose AT&T, another IXC, or even no

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[9] Before January 1, 1999, the maximum SLC for ncn-primary lines was $5.00 per month.

[10] **A** presubscribed interexchange carrier — such as AT&T, Worldcom, or Sprint — may be designated by the customer. This allows the customer tc be routed automatically to that IXC for calls dialed as a "1+area code+number" or "0+area code+number." If a customer chooses no presubscribed interexchange carrier, then the caller must use a "dial around'' service, where the caller dials "1010+XXX+1+area codetnumber," where XXX is the interexchange carrier's access code. *See* ***American*** *Tel. & Tel. v. City of New York,* 83 F.3d 549, 554 (2d

IXC as her primary interexchange carrier, she would still be charged the PICC on her second telephone line."

Finally, Plaintiff seeks damages in the form of a refund of the federally tariffed charges paid for long distance access and injunctive relief to modify the federally mandated way that Defendants provide telecommunications services to the public on behalf of herself and "similarly situated" members of a putative class.

III. ARGUMENT AND AUTHORITIES

A. Plaintiff Challenges The Regulatory Structure Underlying The Nationwide Provision Of Interstate Access Service

Plaintiffs Complaint directly challenges the manner by which Congress and the FCC have mandated that telecommunications services be provided throughout the United States. Plaintiffs claims are not novel. Indeed, they involve a number of regulatory issues that have been conclusively addressed by Congress, the FCC, and the courts since the break-up of AT&T in 1982.

Plaintiffs claims dispute several fundamental precepts that underlie the national regulatory structure for the provision of telecommunications services:

Cir. 1995). Regardless of what the customer chooses, he or she is still charged the PICC. *First Rep. & Order*, at ¶ 92.

[11] Plaintiff also challenges the Universal Connectivity and Monthly Minimum Charges. Depending upon the time period, the Universal Connectivity Charge was a regulated flat-rate charge (before April 1,2000) or a variable-rate charge (after April 2000) charged by AT&T to its presubscribed customers for the use of the long distance network. (*See* Exh. 2 at Sections 3.5.12.B and 24.1.18.) The "monthly minimum" charge is billed each month to presubscribed customers of AT&T and, after June 28, 1999, to GTECC presubscribed customers if a customer's bill during a particular month is less than $3.00. (*See* Exh. 2 at Section 4.1.1 (AT&T) and Exh. 3 at Section 3.5.7. (GTECC).)

- The interconnection by LECs with all other intrastate and interstate telecommunications providers
- The provision of access to the interstate long distance network on all telephone lines
- The charges LECs may recover for the costs associated with access by customers and long distance carriers to the "local loop"
- The effect of filed tariffs on end user's claims that they should not have to pay the tariffed charges.

Each of Plaintiffs challenges is contrary to federal law and regulations and is barred by the filed-rate doctrine.

1. Congress and the **FCC** have established laws and regulations that govern the provision **of** telecommunications service

The services, rates, and charges about which Plaintiff complains are governed by the Federal Communications Act, 47 U.S.C. § 151, *et seq.* ("FCA") as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 TCA"). The express purpose of the FCA is to "make available, so far as possible, to all the people of the United States a rapid, efficient communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To that end, the FCA applies to "all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication." 47 U.S.C. § 152. The FCA represents "comprehensive legislation regulating telecommunications carriers." Marcus, 138 F.3d at 53. To effect this national policy, Congress delegated to the FCC the nationwide authority to implement and enforce the FCA. 47 C.S.C. § 151. The FCC, in turn, has established the rules and regulations that control the outcome of Plaintiff's claims.

2. Basic local telephone service provided by **LECs must** include access **to the** long distance network

Plaintiff alleges that "[t]here is no statutory or other requirement that a given local phone line have long distance capability." (Compl. at ¶ 19.) Essentially, she wants GTE Florida to provide her with a "local-only'' option for telephone service whereby her second phone line is completely detached from any other part of the regulated telecommunications network. Accordingly, she disputes any charge on her bill for the capability of the telephone line she uses to access to the long distance network. But the FCA, as amended by the 1996 TCA, mandates that GTE Florida, like all LECs throughout the United States, provide all customers with access to the interstate long distance network and to all carriers that provide interstate long distance service. 47 U.S.C. § 251(a) and (b). The 1996 TCA provides that it is the duty of each telecommunications carrier *to* interconnect directly or indirectly with the equipment of other telecommunications carriers and that each LEC must provide "dialing parity" to all competing providers of telephone exchange service, which includes long distance service. 47 U.S.C. § 251(a) and (b).[12] The FCA and the 1996 TCA simply do not provide any LEC with the option of offering a "local-only" telephone line.

3. The FCC's *Access Charge Reform* proceeding governs each of the charges Plaintiff does not wish to pay

Plaintiff claims that, because she does not "want" long distance service, she should not have to pay the charges associated with access to the long distance network. (Compl. at ¶¶ 13-26.) She specifically alleges that she should not have to pay the "Camer Line" and

[12] Florida has a similar requirement for all LECs that operate in the state. It requires that LECs offering "basic local telecommunications service," which includes all residential phone lines, provide access to: "emergency services such as 911, ***all locally available interexchange companies,*** directory assistance, operator services, relay services, and an alphabetical directory listing." F.S.A. § 364.02 (emphasis supplied).

"Universal Connectivity" charges and the $3.00 monthly minimum charges that were placed on her telephone bill. Plaintiffs allegations are contrary to federal law. After Congress passed the 1996 TCA, the FCC initiated a comprehensive review of the requirements on LECs, contained in 47 U.S.C. § 251, to interconnect with all providers of local and long distance telecommunications services and the charges that can be passed on to customers and other carriers. This review, known as the *Access Charge Reform* proceeding, directly governs the charges that Plaintiff apparently does not wish to pay for interstate access.

The FCC's *First Report and Order* in the *Access Charge Reform* proceeding sets forth in comprehensive detail the methodology and rationale for the charges for interstate long distance access that appear on customers' bills. The FCC concluded that LECs incur costs *to* provide interstate access services since "[m]uch of the telephone plant that is used to provide local telephone service (such as the local loop, the line that connects a subscriber's telephone to the telephone company's switch) is also needed to originate and terminate long-distance calls." *First Rep, and Order,* at ¶ 17. It held that LECs may recover the costs for providing this local loop (and interstate access) through several different types of charges, including the SLC, CLCC, and PICC charges about which Plaintiff complains. *First Rep. and Order,* at ¶ 36-41. Plaintiff disputes Defendants' right to charge Plaintiff for long distance access.

The Eighth Circuit affirmed the imposition of charges for long distance access services about which Plaintiff complains. *Southwestern Bell Tel. Co. v. Federal Comm. Comm'n,* 153 F.3d 523 (8th Cir. 1998). In its review of the FCC's orders in the Access *Charge Reform* proceedings, that court addressed the identical argument that Plaintiff

attempts to make here — that is, whether a customer who wants "local-only" service should not have to pay for access to the long distance nehvork. The Eighth Circuit summarily rejected this argument. It held that:

> **A** subscriber who does not use the subscriber line to place or receive interstate calls imposes the same [local loop] costs as a subscriber who does use the line. Thus, simply by requesting telephone service, the subscriber "causes" local loop costs, whether it uses the service for intrastate or interstate calls. It is therefore appropriate and rational for the Commission to impose those costs on the end user.

Id. at 558 (internal citations omitted). Specifically, the Eighth Circuit affirmed the imposition of the charges for interstate long distance access that Plaintiff disputes – the SLC, CLCC, and PICC – as set forth in the FCC's *Firsr Report and Order*.

Accordingly, Plaintiffs argument that she should not have to pay these federally mandated and permitted charges for access to the long distance nehvork is neither novel nor legally correct. Her Complaint should be dismissed in its entirety on this basis alone.

4. The filed-rate doctrine **bars** Plaintiff's claims because all of the charges are set forth in Defendant's tariffs

The charges that Plaintiff disputes for long distance access are not only permitted by federal law, they are contained in binding tariffs filed with the FCC. As common carriers of long distance services, Defendants must file tariffs containing all their charges for interstate services and all "classifications, practices, and regulations affecting such charges" with the FCC. 47 U.S.C. § 203(a). The carriers are bound to provide telecommunication services under the conditions in their tariffs. 47 U.S.C. § 207. No carrier shall "(1) charge, demand, collect or rsceive a greater or less or different compensation for such communication, or for any service in connection therewith . . . or (2) refund or remit by any means or device any

portion of the charges so specified [in the tariff]. . . ." 47 U.S.C. § 203(c). *See American Tel. and Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214,221-22 (1998).

Contrary to Plaintiffs assertion that there is no contract, these filed tariffs operate as the "contracr" between the carriers and their customers and have the force and effect of law. *Cahnmann v. Sprint Corp.*, 133 F.3d 484,488 (7th Cir. 1998). They "conclusively and exclusively control the rights and liabilities between a carrier and its customer." *MCI Telecomms. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 132 (D.N.J. 1995) (quoting *American Tel. & Tel. Co. v. Florida-Texas Freight, Inc.*, 351 F. Supp. 977,979 (S.D. Fla. 1973), *aff'd*, 458 F.2d 1390 (5th Cir. 1973); *American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996); *Carter v. American Tel. & Tel. Co.*, 365 F. 2d 486, 496 (5th Cir. 1966) **("[A]** tariff, required by law to be filed, is not a mere contract. It is the law.") Consequently, the filed-rate doctrine "forbids a regulated entity to charge rates . . . other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571,577 (1981).

Each of the defendants has filed tariffs with the FCC relating specifically to the services and charges about which Plaintiff complains. All of the charges that Plaintiff disputes are clearly described in the Defendants' federal tariffs and appear on Plaintiffs telephone bills attached to her Complaint. Attached at Exhibit 6 is a chart that sets forth the specific sections of the GTE Florida and AT&T tariffs for the charges that Plaintiff disputes.

Plaintiff attempts to couch her claims in terms of breach of contract, misrepresentation, and the imposition of a "negative option." But regardless of what she

chooses to call her claims, they are barred by the filed-rate doctrine, which prohibits Defendants from charging any more or any less than what is set forth in their tariffs.

The purpose of the filed-rate doctrine supports this conclusion: it is designed to prevent any price discrimination among customers by common carriers by requiring them to charge only the tariffed rate and to keep the courts from engaging in the rate-making process. *See Taffet,* 967 F.2d at 1488-89; *Marcus*, 138 F.3d at 58; *see also Central Office,* 524 U.S. 214,222-23. Because the filed tariff is binding on both the carrier and the end-user, a plaintiff cannot plead "ignorance or misquotation of rates [as] **an** excuse for paying or charging either less or more than the rate filed." *Marcus,* 138 F.3d at 59.

The filed-rate doctrine precludes judicial relief that would, in effect, be a "charge" other than the rate contained in federally filed tariffs. ***See,*** *e.g., Marcus,* 138 F.3d at 59; *Kline & Company* ***v.*** *MCI Communications Corp.*, 2000 WL 694179, *3 (D. Mass. 2000); *Kutner* ***v. Sprinf*** *Cominunications,* 971 F. Supp. 302,306 (W.D. Tenn. 1997) (filed-rate doctrine "forbids courts from ordering relief that would contravene the filed tariff'). Therefore, any claim that seeks such relief, whether brought in contract or in tort, is barred. *Marcus,* 138 F.3d at 60 (barring all claims seeking compensatory damages because such relief would "undermine[] the Congressional scheme of uniform rate regulation."); *Kutner*, 971 F. Supp. at 306 (reasoning that "allowing attacks on filed rate in judicial proceedings would entangle the courts in the rate-making process and undermine the regulatory agency's authority."); *see also Central Office,* 524 U.S. at 226, (because respondent asked for "special services" or privileges not included in the tariff, its state-law claims were barred).

To the extent Plaintiffs vague claims might be read to allege that GTE Florida or AT&T somehow misrepresented the rates, charges, or practices for long distance service to her, those claims are also barred. *MCI Telecomm. Corp. v. Best Tel.* Co., 898 F. Supp. 868, 873 (S.D. Fla. 1994) (even in face of deliberate misrepresentation of filed rate, plaintiffs claims were barred so long as defendant charged the filed rate).

This Court should dismiss Plaintiffs claims here, whether styled as contract or tort claims, because the relief she requests would necessarily require the Court to refund the charges collected pursuant to Defendants' federally filed long distance access rates in violation of the filed-rate doctrine. Moreover, Plaintiffs requested injunctive relief asks the Court to fundamentally alter the method by which Defendants provide, bill, and collect for access to the long distance network on a nationwide basis. Such relief would impermissibly burden the national uniformity of federal telecommunications regulation and would place the Court in the unauthorized role of a "rate-maker." Consequently, Plaintiffs Complaint should be dismissed in its entirety.

B. Plaintiff's Breach **Of** Contract And Misrepresentation Claims Fail Because **She** Has Alleged **No** Legal **Injury**

Plaintiffs claims are also legally deficient in that they fail to allege facts to demonstrate she has suffered any legal injury. Pursuant to the filed-rate doctrine, if a customer is charged the tariffed rate, she has no legal injury. *Taffett,* 967 F.2d at 1494; ***see*** *also Kutner v.* ***Sprint*** *Communications* Co., 971 F. **Supp.** 302, 307 (W.D. Tenn. 1997) ("any subscriber who pays the filed rate has suffered no legally cognizable injury. . . ."). Plaintiff does not argue that she was charged something other than the tariffed rate.

Similarly, Plaintiff cannot rely upon her naked allegations of "no contract" and "ignorance" to avoid paying the tariffed rates she was charged. ***See*** *Marco* ***Supply,*** *Co., Inc. v. AT&T Comm., Inc.*, 875 F.2d 434,436 (4th Cir. 1989); *Graphnet*, 881 F. Supp. at 132. Plaintiff has failed to allege any facts that, if proven, would show she suffered legal injury. Consequently, her claims for breach of contract and misrepresentation should be dismissed.

C. Plaintiff's Claim For Restitution Is Barred Because The Terms Of Her Contract Were Fully Disclosed In Defendants' Tariffs

Plaintiffs claim for "restitution" in Count III is similarly founded upon the legally unsupportable notion that the terms of her contract for telecommunications service were concealed or were not accepted. ***(See*** Compl. at ¶ 57.) As explained above, the contract terms are clearly set forth in the tariffs that each defendant has filed. Plaintiff is presumed to know those terms. *Marco* ***Supply,*** 875 F.2d at 436. Therefore, Plaintiffs contract for service is not, as she alleges, void or voidable. Her claim for restitution must fail.

D. Florida's Unfair and Deceptive Trade Practices Act Is Inapplicable Because Plaintiff Complains About Conduct Permitted By Federal Law

Plaintiff seeks damages for alleged violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). Plaintiffs claim here must be dismissed because the conduct that she alleges is regulated, in the case of GTE Florida, by both the FCC and the Florida PSC, and in the case of AT&T, by the FCC. Moreover, the "unfair" conduct that forms the basis of her complaint relates to tariffed charges that Defendants are permitted to make by virtue of the FCA and the FCC's *Access Reform Charge* proceedings. ***See*** discussion in Section III(A)(3) above.

The FDUTPA exempts from its reach conduct by "any person or activity regulated under laws administered by . . . the Florida Public Service Commission." F.S.A. §501.212(4). It also exempts any "act or practice required or specifically permitted by federal or state law." F.S.A. § 501.212(1). *See Eirman v. Olde Discount Corp.*, 697 So. 2d 865, 866 (4th DCA Fla. 1997) (where the alleged conduct was permitted by federal law, the court dismissed plaintiffs FDUTPA claim). Here, because Plaintiffs allegations relate entirely to regulated, permissible, and, in the case of the tariffed charges, mandated conduct, the FDUTPA does not apply.

E. In The Alternative, Plaintiff's Complaint Should Be Dismissed or Stayed Pursuant To The Doctrine Of Primary Jurisdiction

Even if this Court were to conclude that some or all of Plaintiffs claims are not barred by the filed-rate doctrine, or are otherwise improper, Plaintiffs Complaint should still be dismissed because her claims directly challenge the reasonableness of Defendants' federally permitted and tariffed billing rates and practices for long distance access. ***See*** 47 U.S.C. § 205. Congress has charged the FCC with the nationwide authority to set and review the charges at issue in Plaintiffs Complaint. 47 U.S.C. § 201. Moreover, the charges that Plaintiff disputes have been the subject of lengthy and complex proceedings before the FCC, some of which are still ongoing. Because Plaintiff challenges the reasonableness of those charges and practices, the FCC should be afforded the opportunity to resolve those challenges. ***See*** 47 U.S.C. § 207.

The primary jurisdiction doctrine requires that where administrative expertise and experience to resolve claims rests with an administrative agency, a court should exercise its discretion to dismiss the Complaint and refer Plaintiff to that agency. *Total Telecomm*

Servs., Inc. v. American Tel. & Tel. Co., 919 F. Supp. 472,478 (D.D.C. 1996). The doctrine rests "on a concern for uniform outcomes . . . and on the advantage of allowing an agency to apply its expert judgment." *Allnet Comm. Serv., Inc. v. National Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (citing *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426,441 (1907), and *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956). The agency's expertise "is not limited to technical matters, but extends to the agency's mandate to implement, in this case, the Telecommunications Acts of 1934 and 1996, and the concomitant policy judgments it must make." *Total Telecomm.*, 919 F. Supp. at 478.

Plaintiff's Complaint challenges the reasonableness of the FCC's considered, and congressionally authorized, decision to require all end users to pay for access to the long distance network and the amount that telecommunications providers may charge for that access. *See* 47 U.S.C. §§ 201,205, and *In re Access Reform Charge, First Report & Order.* To award Plaintiff the relief she requests necessarily requires this Court to engage in a retroactive review of the implementation of the FCA and the 1996 TCA, the FCC's *Access Reform Charge* proceedings, the Eighth Circuit's affirmance of the FCC's *First Report & Order,* and the nationwide structure of telecommunications policy. Accordingly, this Court should dismiss or, in the alternative, stay Plaintiffs case pursuant to the doctrine of primary jurisdiction and refer her to the FCC for finther proceedings.

CONCLUSION

For all the foregoing reasons, Plaintiffs Complaint should be dismissed either pursuant to the filed-rate doctrine or pursuant to the doctrine of primary jurisdiction.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of GTE **Florida Incorporated** And AT&T **Corp.'s** Memorandum **Of Law** In **Support Of Their Dispositive Motion** To **Dismiss** Pursuant **To Federal Civil Procedure Rule 12(b)(6)** upon counsel of record for Plaintiff and counsel for other Defendants, by causing a copy of same to be deposited in the United States Mail, postage prepaid, and properly addressed as follows:

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FACILITIES FOR INTERSTATE ACCESS

Regulations. Rates and Charger Applicable Lo

Facilities for Interstate Access, Ancillary and Miscellaneous Services

provided by

GTE Telephone Operating Companies

to Interstate Customers

Services herein are provided by means of wire. fiber optics. radio or any other suitable technology or a combination thereof.

The geographical applications are as indicated following the names of the issuing carriers on Title Page 2.

*Except Section 5. Special Access. effective April 1, 1985

(This page filed under Transmittal No. 950.) (T)
(T)

Director - Pricing and Tariffs
600 Hidden Ridge. Irving, Texas 75038

EXHIBIT "1"

FACILITIES FOR INTERSTATE ACCESS

ISSUING CARRIERS

GTE North Incorporated
For the States of: Illinois (T)
Indiana
Iowa
Michigan
Missouri
Nebraska (also serving Kansas)
Ohio
Pennsylvania
Wisconsin (T)

GTE Alaska Incorporated
For the State of: Alaska (T)

GTE California Incorporated
For the State of: California (T)

GTE Florida Incorporated
Far the State of: Florida (T)

GTE Northwest Incorporated
For the States of: Idaho
Oregon
Washington (T)

GTE West Coast Incorporated
For the State of: California (T)

GTE South Incorporated
For the States of: Alabama
Illinois
Kentucky
North Carolina
South Carolina
Virginia (T)

Contel of the South
For the States of: Indiana
Michigan (T)

Contel of Minnesota Incorporated
For the State of: Minnesota

(This page filed under Transmittal NO. 950.)

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600 Hidden Ridge. Irving. Texas 75038

FACILITIES FOR INTERSTATE ACCESS

ISSUING CARRIERS (Cont'd)

GTE Southwest Incorporated (T)
For the States of: Arkansan |
New Mexico (TI
Oklahoma
Texas (T)

GTE Hawaiian Telephone Company Incorporated (T)
|
(T)

For the State of: Hawaii

(T)
(T)

The Micronesian Telecommunications Corporation
For the: commonwealth of The
Northern Mariana Islands
P.O. Box 306
Saipan, HP 96950